

HILLSBOROUGH, SS
NORTHERN DISTRICT

THE STATE OF NEW HAMPSHIRE

SUPERIOR COURT

2001

No. 00-M-0815
LISA A. HOLMES

v.

RALPH F. HOLMES

ORDER

Acting in the capacity of an interested member of the public the Petitioner, Theodore Kamasinski ("Mr. Kamasinski"), seeks access to certain sealed court records and to certain discovery materials currently the subject of protective orders in the above-captioned divorce proceeding. The Defendant, Ralph F. Holmes ("Mr. Holmes"), objects to disclosure. The Plaintiff, Lisa A. Holmes ("Ms. Holmes") objects in part. The guardian ad litem ("GAL") objects to the disclosure of the sealed GAL report.

Subsequent to review the Court renders the following determination.

By way of brief background, and for purposes of this Order only, the Court finds the following facts. Mr. and Ms. Holmes were married in 1987. They have three sons by the marriage. The boys' ages are seven, nine, and eleven.

Ms. Holmes filed a Petition for Divorce on May 26, 2000. Pursuant to RSA 458:17-a, by Order dated 12/29/00, the Court (Lynn, J.) appointed Jennifer Elliott, Esq., GAL for the parties' three children. The GAL was charged with investigating and

making recommendations on three issues: (1) legal custody; (2) primary physical custody/shared custody; and (3) visitation/custodial time. The GAL filed her report with the Court on August 6, 2001. Pursuant to Superior Court Rule 213 the report was sealed by the clerk's office.

Rule 213 states:

Reports filed by guardians ad litem in domestic relations cases involving custody, custodial rights, or visitation arrangements for any minor child shall be placed in an envelope marked "CONFIDENTIAL" by the clerk. Such reports shall be made available only to parties in the action and their attorneys. The clerk shall remove the envelope before making the file available to any other individuals requesting access.

Super. Ct. R. 213.

On August 11, 2000, the Court (Lynn, J.) ordered certain financial documents sealed. The parties, however, have agreed to unseal said documents in response to Mr. Kamasinski's Petition for Access. Consequently, the Court need not address the matter of the financial documents further in this Order. The Court will issue a separate Order concerning the unsealing of the financial documents.

The GAL report and the aforementioned financial documents are the only court records in this case that are presently sealed. Certain discovery materials, however, have been the subject of protective orders issued by the Court. These materials include: polygraph examination reports; documents

relative to Mr. Holmes' employer (McLane Law Firm); and psychological records obtained by the GAL from Ms. Holmes' treating mental health care providers. These discovery materials were ordered produced to the opposing party but were also made subject to protective orders. The materials are not part of the court record. They may or may not become part of the record as the parties see fit to introduce the materials at trial. At the conclusion of the case the copies produced will be submitted to the Court and placed under seal so as to be available in the event of an appeal. But they are not yet part of the court record.

Mr. Kamasinski brings his Petition for Access to Court Records pursuant to Petition of Keene Sentinel, 136 N.H. 121 (1992), and in support of his request states:
Under part I, articles 8 and 22 of the New Hampshire Constitution, the Public has a presumptive right of access to all Court hearings and to all records filed with the Court, unless limited by a statutory provision that does not offend the New Hampshire Constitution or the United States Constitution.

Theodore Kamasinski's Petition for Access to Court Records at 1.

Mr. Kamasinski seeks access to the GAL report and the financial documents, as well as the discovery materials not yet part of the court record.

With the exception of the financial documents, Mr. Holmes objects to any disclosure, stating in support that such

disclosure would harm the parties' children and unnecessarily damage Mr. Holmes' professional reputation. Mr. Holmes also takes the position that the discovery materials are not part of the court record and are therefore not subject to a petition for access pursuant to Petition of Keene Sentinel. Mr. Holmes also asserts that, if the Court finds that Mr. Kamasinski has standing to request the discovery materials despite the fact that they are not in the court record, then the McLane Law Firm is a necessary party with respect to the materials originating from it.

Ms. Holmes objects only to the disclosure of the discovery materials pertaining to her psychological records. She takes the position that the disclosure of her psychological records would be harmful to the children. Otherwise she supports disclosure and does not believe it will harm the children.

The GAL objects to the disclosure of the GAL report, stating in support that it would not be in the best interest of the children to make the report public. The GAL likewise objects to the disclosure of the psychological records, for the same reason.

Mr. Kamasinski states that the public has a legitimate interest in accessing the documents in question - both the sealed court records, and the discovery materials subject to protective order. Mr. Kamasinski asserts that there is no substantive difference between the documents under seal and the documents under protective order since the result is the same: denial of

public access. Mr. Kamasinski acknowledges and concedes that the State has a legitimate interest in protecting the children. Mr. Kamasinski contends, however, that there is no State interest in protecting the professional reputation of Mr. Holmes.

Any member of the public has standing to request access to court records. Petition of Keene Sentinel, 136 N.H. at 125. The motivation of the person seeking access is irrelevant to the question of whether access should or should not be granted. Id. at 128. There is a presumption that court records are open to the public. Id.

The party advocating nondisclosure bears the burden "to demonstrate with specificity that there is some overriding consideration or special circumstance, that is, a sufficiently compelling interest, which outweighs the public's right of access to those records." Id. In meeting this burden it is not sufficient merely to invoke a general privacy interest. Id. at 129. The public's right to access must be balanced against a privacy interest "articulated with specificity." Id.

The Court must examine each sealed document to which the petitioner seeks access to determine if there exists a "sufficiently compelling reason" that would justify nondisclosure. Id. at 129-130. When the Court weighs the countervailing interests to determine the extent to which a document is to be revealed it must take into account the

particular circumstances surrounding the case in question. Id. at 130. To justify nondisclosure, the Court must determine that no reasonable alternative exists. Id. Moreover, the Court "must use the least restrictive means necessary to effectuate the purposes sought to be achieved." Id.

The Court first addresses the discovery materials. For the reasons which follow the Court determines that the discovery documents to which Mr. Kamasinski seeks access are not subject to the procedure described in Petition of Keene Sentinel. The reason is simple: the documents are not part of the Court record.

All parties concede that the McLane Law Firm would be a necessary party if the discovery materials associated with it became part of the Court record and thus subject to disclosure. Such is not yet the case. It is not necessary, therefore, to reach the issue of whether the McLane Law Firm is a necessary party.

Accountability of the government is the *raison d'être* underpinning the constitutional right articulated in Part I, article 8 of the New Hampshire Constitution. When the Court seals its records the public cannot scrutinize the Court's actions. Hence the public cannot effectively keep the Court accountable. But the issuance of a protective order to control the disclosure of discovery materials *outside the Court record* is *sui generis*. When the documents subject to the protective order

are outside the court record, the rationale behind the principle of public accessibility is inapplicable. That is because the documents in question are not a record of the government's actions - they are a record of private actions.

The public has an interest in keeping the government accountable; the public has no legitimate parallel interest in keeping private citizens accountable. Nonetheless, the Court recognizes that the motivation of a petitioner such as Mr. Kamasinski is irrelevant. Thus, if the Court were to conclude that Mr. Kamasinski's motive for seeking access to the records in question was solely to blacken the good reputation of a successful attorney and the reputation of Ms. Holmes as well, that fact would not effect the Court's analysis with respect to sealed court records. But some of the documents Mr. Kamasinski seeks are not court records at all. The rationale behind Petition of Keene Sentinel is that "[a] private citizen seeking a divorce in this State must unavoidably do so in a public forum, and consequently many private family and marital matters become public." Id. at 128. Until the private and marital matters enter the public court record, however, they remain private and consequently inaccessible to the curious public.

Thus, it is firmly established that any member of the public has standing to seek access to court records. Petition of Keene Sentinel, 136 N.H. at 125. In contrast, it is not true that any

member of the public has standing to request the Court to lift a protective order concerning documents not in the record. In other words, Ms. Holmes could request that the Court lift the protective orders. Likewise Mr. Holmes can make such a request. Mr. Kamasinski, however, cannot; he has no standing to do so.

The Court next addresses the disclosure of the GAL report. Unlike Superior Court Rule 158, discussed in Douglas v. Douglas, 146 N.H. ____ (decided Mar. 29, 2001), which prior to its repeal made provision for the permissive sealing and subsequent disclosure of affidavits, Superior Court Rule 213 makes no provision for the disclosure of GAL reports. To the contrary, the Rule expressly states that "[s]uch reports shall be made available **only** to parties in the action and their attorneys." Super. Ct. R. 213 (emphasis added). Thus, the Rule must be read as already incorporating the balancing test described in Petition of Keene Sentinel. In other words, the Rule embodies the view that protecting the children of divorcing parents is such a compelling State interest that the GAL report should *in all cases* remain undisclosed. No case by case balancing is required. The whole purpose of the report is to safeguard the interest of the children. The purpose of keeping the report confidential is to provide the children with one last bastion of privacy, safe from the inquisitive eyes of the public. The Court can find no benefit from the disclosure of a report replete with sensitive

information concerning the parties' children.

Children of divorce are often the victims in untold ways. The Court is loathe to find that the Constitution of this State or of the United States would deny them this last haven of privacy. Disclosure of the GAL report carries with it the probability of irreparable injury to three innocents trapped in the vituperative jaws of an acrimonious war waged by two whom they love equally. Thus, the Court determines that no reasonable alternative exists. Protecting the parties' children from the acid fallout of divorce is the purpose the Court now seeks to achieve. The Court finds that nondisclosure is the least restrictive means necessary to effectuate that purpose.

Accordingly, Mr. Kamasinski's petition is DENIED.

So ORDERED.

Dated: November 7, 2001

JAMES J. BARRY, JR.
PRESIDING JUSTICE